In the Supreme Court of the United States.

THOMAS C. ANDREWS
v.
THE UNITED STATES AND KIOWA and Comanche Indians. } No. 7836.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

The claimant Andrews brought suit in the Court of Claims under the provisions of the Indian depredation act of March 3, 1891, entitled "An act to provide for the adjudication and payment of certain Indian depredation claims" (26 Stat. L., ch. 538, p. 851), alleging that the Kiowa and Comanche Indians had, in June, 1877, in the Indian Territory, taken from him property of the value of $9,225.

To this claim the defendants plead that, the depredation having been committed on the Kiowa and Comanche Indian Reservation, the claimant was there contrary to the express provisions of the treaty of 1868 with said Indians, and that he was, therefore, a trespasser and could

not recover under the act of March 3, 1891, conferring on the Court of Claims jurisdiction over certain Indian depredation claims arising under the act of April 30, 1834, and subsequent acts.

The act of April 30, 1834, provided—

> That if any Indian or Indians belonging to any tribe in amity with the United States shall, *within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory* inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application, etc. * * * *And provided also*, That unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim, at the payment of the next annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the Treasury of the United States.

The court below dismissed the defendants' plea and awarded judgment for the claimant, and for a second finding of fact found:

> That in June, 1877, while the claimant, with a large number of cattle, was traveling over the Chisholm trail, the same being an established trail, en route from Texas to a market in Kansas, and while camped on the Washita River, on the Kiowa and Comanche Indian Reservation in the Indian

Territory, Indians belonging to the Kiowa and Comanche tribe of Indians took and drove away property of the kind and character described in the petition, the property of the claimant, which was then and there reasonably worth the sum of $8,300. Said property was taken as aforesaid without just cause or provocation on the part of the owner or agent in charge, and has never been returned or paid for.

The defendants now appeal to this court from said judgment.

CLAIMANT WAS IN FACT A TRESPASSER.

It was incumbent upon the claimant, in order to establish his cause of action, to show by what right or authority he was upon the Indian reservation when he suffered the loss of his property.

This he attempted to do in the court below by alleging:

I. That he was traveling over an established trail; in other words, a right of way by user.

II. A permit from the Secretary of the Interior to certain classes of persons.

III. A special permit of the chief, Bear Shields, of the Cheyenne tribe of Indians; that is to say, he gave 15 head of cattle for the right of passage.

He made no claim of being lawfully on the Indian reservation, otherwise than by virtue of the conditions expressed and implied in these three allegations.

I.

THE PLEA OF USER OR PRESCRIPTION.

As to the right of the claimant or the public to use the "Chislom trail" and pass over or through the Indian reservation, he shows no requisite whatever to the establishment of such right, whether among the Indians, where far greater strictness prevails, or anywhere else.

It appears that the claimant "was traveling the 'western Chisolm trail;' that the trail had been used by citizens of northern Texas to drive their cattle to market in Kansas." All this may be, but it comes far short of establishing a right to drive cattle through or to enter upon the Indian reservation.

The treaty with the Kiowa and Comanche Indians, proclaimed August 25, 1868 (15 Stat. L., p. 581, Art. II), provides:

> The United States agrees that (the*) following district of country, to wit: Commencing at a point where the Washita River crosses the ninety-eighth meridian west from Greenwich; thence up the Washita River, in the middle of the main channel thereof, to a point 30 miles, by river, west of Fort Cobb, as now established; thence due west to the north fork of Red River, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line, and thence south, on said meridian line, to the said north fork of Red River; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red River; thence down said river, in the middle

of the main channel thereof, to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning, shall be, and the same is hereby, set apart *for the absolute and undisturbed use and occupation* of the tribes herein named, and for such other friendly tribes or individual Indians as, from time to time, they may be willing (with the consent of the United States*) to admit among them; *and the United States now solemnly agrees that no persons except those herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article*, or in such territory as may be added to this reservation, for the use of said Indians.

As to user, it is a universal rule of law that in no case can a mere use of a road by the public for any length of time constitute it a public road. (*Gaines* v. *Merryman*, 95 Va., p. 660; *Burlew* v. *Hunter*, 58 N. Y. Supp., p. 453.)

An adverse right to an easement can not grow out of a mere permissive employment. (*Beach* v. *Morgan*, N. H., 41. Atl. Rep., 349.)

But to acquire a public right by prescription, the use by the public must be adverse, continuous, and exclusive. A mere tacit permission or license by the landowner will not suffice. Held, therefore, that the fact that a landowner for a long period of years permitted the residents of a neighboring village, and visitors thereto, to pass through his gate and over his land to an attractive

beach on the seashore created no prescriptive right to a public road through his land. (*Coburn* v. *San Mateo County, Cal.*, 75 Fed. Rep., 520.)

And especially no rights can accrue to the public over wild, uninclosed prairie by mere user (*Angle* v. *Hunt*, Neb., 69 N. W. R., 970), or other vacant land. So that the mere fact that a road has been continuously used for more than twenty years by people having occasion to travel between points reached by it does not show a highway by prescription, where it appears that the road ran through a sparsely inhabited, mountainous region, and had never been laid out and recognized as a highway by the road authorities. (*People, ex rel.*, v. *Osborn*, 32 N. Y. Supp., 358.)

And certainly occasional travel across Government land, which has never been laid out, recorded, or marked as a public road, will not constitute it a highway. (*Sutton* v. *Nicholaison*, 44 Pac. Rep., 805.)

The existence of a highway by prescription is not shown by the evidence of an indefinite and indiscriminate use of a wide extent of open prairie, or by the various wagon tracks thereon, during the prescriptive period. (*Friel* v. *People*, 35 Pac. Rep., 676.)

Where the proprietor of land has a pathway through it for his own use, the mere permissive use of it by other persons, even for half a century, does not confer upon them any right to its enjoyment. So long as its use is merely permissive it confers no right, but the proprietor can prohibit its use, or discontinue it altogether, at his pleasure. To create a presumption of a grant of the right of way, the circumstances attending its use

must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right and has not been regarded by the parties merely as a privilege, revocable at the pleasure of the owner of the soil. (*Hall* v. *McLeod*, 2 Met. Ky., 98.)

To authorize the presumption of a grant, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner. (*Parker* v. *Foote*, 19 Wend., N. Y., 309.)

The public can not gain an easement by prescription in so far as that implies a grant, as the public can not be made a grantee, although the inhabitants of a particular village or locality may acquire a right to an easement, such as a way across a parcel of land, by custom. (Washburn on Real Property, 5th edition, vol. 11, p. 347.)

Parties dealing with Indians must take notice of public treaties and acts of Congress. (*Laughton* v. *Nadeau*, 75 Fed. Rep., 790.)

By Article XII of the treaty of 1868 with the Kiowa and Comanche Indians it is provided that—

> No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as

> against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying the same.

So that Indians can not grant any interest or easement in lands otherwise than as thus described.

It is, therefore, absurd to claim, as the petitioner in this case actually does, that the doctrine of adverse possession, in regard to a right of way, can have application.

In fact, Article II of the treaty expressly precluded any such claim of right.

II.

THE CLAIM OF AUTHORIZATION BY THE SECRETARY OF THE INTERIOR.

If the contention of the claimant in the court below is correct, it follows that the Secretary of the Interior had the power to annul or modify any express provisions of a treaty made with an Indian tribe. The claimant finds this extraordinary function conferred in part by section 463 of the Revised Statutes of 1834, to wit:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, with and agreeable to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

It is not easy to see wherein this act gives the official named any dispensing power over Indian treaties, but the claimant observes that—

> "This law is broad enough to cover all matters growing out of the relations of the Indians with the

> Government and this law, together with the act of May 29, 1872, was authority for the Secretary of the Interior to issue the rules of July 13, 1872."

What was this supplemental statute of May 29, 1872, which clinched the dispensing authority of the Secretary of the Interior? In fact, it was a mere *practice act* and provided—

> That it shall be the duty of the Secretary of the Interior to prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulations for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims as may be presented subject to the rules and regulations prepared by him and report to Congress at each session thereof the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based: *Provided*, That no payment on account of said claim shall be made without a specific appropriation therefor by Congress. (17 U. S. Stat. L., sec. 7, p. 190.)

Certainly this language does not indicate that the Indian treaties are subject to the arbitrary rulings of the Secretary of the Interior, and in promulgating his instructions under the above act of Congress of May, 1872, the Secretary of the Interior did not intend to set aside the treaty of 1868 with the Kiowa and Comanche Indians nor any of its provisions, but only to prescribe "*the manner of presenting claims.*" Nor did Congress

intend to confer upon the Secretary of the Interior, or upon any other official, any such autocratic power.

On July 13, 1872, the Secretary of the Interior issued the following "rule" or "regulation:"

> Should the depredation have been committed while the claimant was in the Indian country he must state whether he was lawfully there, either having a license to trade with the Indians, a passport, or a permit from the proper Indian authority, or was en route through said country to a place of ultimate destination to some point within the limits of any State or Territory not included within the limits of the reservation for any nation or tribe of Indians set apart by treaty provision or by Executive order.

It may be well to observe that this claimant has not brought himself within the scope of these express terms, even allowing his own interpretation of the general meaning of the Secretary's rules to be correct.

He does not claim to have had a license to trade with the Indians, or to have had a passport, nor does he show a permit from any Indian authority, nor that he was a mere traveler en route.

But if it is held that the "instructions," or "rules," or "regulations" of the Secretary of the Interior contravene the provisions of the said treaty, the latter must prevail, because not rules and regulations of the Secretary of the Interior merely, but treaties are a part of the law of the land.

And Article II of the said treaty with the Kiowa and Comanche Indians expressly defines the classes of persons allowed within the reservation and prohibits all

others without exception. The language is (Article II, 15 U. S. Stat. L., p. 582), after fixing the bounds of the reservation:

> * * * Shall be and the same is hereby set apart *for the absolute and undisturbed use and occupation of the tribes herein named*, and for such other friendly tribes or individual Indians as, from time to time, they may be willing (with the consent of the United States*) to admit among them; *and the United States now solemnly agrees that no persons except those* herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservation in discharge of duties enjoined by law *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article*, or in such territory as may be added to this reservation, for the use of said Indians.

By this imperative language the claimant is deprived of all claim that he was lawfully on the reservation, nor do the provisions of the treaty grant to any official of the Government power to admit anyone else than those specified; but it expressly declares that *no other person "shall ever be permitted to* PASS OVER, *settle upon, or reside* in the territory described," etc.

Again, Article I of the treaty, after providing for the punishment of wrongdoers against the whites, provides:

> And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as, in his judgment, may be proper; but no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs

and the Secretary of the Interior; *and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be reimbursed therefor.*

This establishes beyond controversy that the Indians understood and the United States intended that the reservation was "set apart for the absolute and undisturbed use and occupation of the Indians," and any entry upon the same was not only a violation of the treaty, but of the statute.

The Court of Claims held in the *Welch Case* (32 C. Cls. R., 106) that it was unlawful to settle in the Indian country. The claimant in the case at bar had not settled upon the Indian reservation, but was driving a large number of stock from Texas through the reservation to Kansas. But the treaty stipulation places settlers and those en route in the same category, the language being that no person "shall ever be permitted to pass over, settle upon, or reside," so that it is as unlawful to *pass over* as to settle upon the Indian lands or Indian reservation.

But it may be argued by the claimant that he was passing through the reservation in the exercise of a right of transit along and upon an established trail, which other citizens had used. It does not appear by what authority this alleged trail was established. Certainly not by act of Congress, and if this, with other trails, were recognized by the Department of the Interior, it was a recognition against the interests of the Indians and deprived them of rights guaranteed them by the treaty.

If the claimant and others were accustomed to use this alleged trail before the Kiowa and Comanche Indians were transferred by the treaty of 1868, then, upon the ratification of the treaty, all persons were forever prohibited from passing over, settling upon, or residing in the territory set apart by the treaty as a reservation.

Whatever rights the public acquired to pass over this alleged trail prior to the ratification of the treaty and prior to the occupation of the reservation therein described by the Indians were abolished, and if the claimant went upon the reservation with his property he did so at his peril, for he was bound by the express provisions of the treaty.

The treaty upon ratification became the supreme law of the land, and by its terms and provisions must be measured the rights and priviliges of the citizens. Their rights can not be measured by any rule or regulation issued by the Secretary of the Interior or by his Department. The custom of passing over certain trails prior to the execution of the treaty, even with the permission of the Deparament of the Interior, can not be held to confer any rights after the treaty had become operative.

Again, the claimant contended in the court below "that being lawfully or unlawfully in the Indian country certainly was a question for the Interior Department, and its decision was final and conclusive upon this court." He also cited a letter written by the Secretary of the Interior in 1874, in which the Secretary stated "as a general proposition it is quite clear that no community, politically or otherwise organized, whether State, Territorial, or Indian tribes, can legally delay or obstruct by

tax or otherwise the free transit, whether of persons or merchandise, to and from market over any part of the territory of the United States."

This construction would make the Court of Claims merely the agent to carry out the line or practice inaugurated by the Secretary of the Interior or by his Department. The court would then be bound by the decisions of the Secretary of the Interior in all questions affecting the construction of a prior statute or treaty. So far as it affects treaty relations, or rights growing out of treaties, it is a declaration that the construction put upon treaties or statutes by the Secretary of the Interior shall be binding upon all courts of the United States.

Such a doctrine can not be maintained.

The construction put upon an act by departmental officers charged with its execution, says Endlich—

> Will, in cases of doubt and ambiguity—*but, it is said, only in such cases*—be adopted by the courts, or, at least, not disregarded by them, except for cogent reasons. As, however, no such usage can alter the law, it can not *in any proper sense, be binding upon the courts*, bound, as they are, to construe all laws coming before them according to their own judicial views. *Nor, on the reenactment of a statute with additions, would the departmental construction of the original act control the construction of the new one*, especially where this would make some part of the addition repugnant to the body of the enactment. * * * (Endlich on Construction of Statutes, secs. 360, 361.)

It was held in the *Graham Case* (110 U. S., 219), where it was said that the statute there under consideration was clear in its meaning:

Such being the case, it matters not what the practice of the Department may have been, or how long continued, for it can only be resorted to in aid of interpretation and it is not allowable to interpret what has no need of interpretation.

Where a law is expressed in plain and unambiguous terms, whether these terms are general or limited, the legislature should be intended to mean what it has plainly expressed. (*Lake County Commissioners* v. *Rollins*, 130 U. S., 662.) Where a statute is clear and free from all ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what is the policy of the Government, even though it may be the settled practice of an executive department. (*St. Paul M. & M. R. Co.* v. *Phelps*, 137 U. S., p. 528.)

A regulation of a Department of the Government does not control the construction of an act of Congress when its meaning is plain. (*Robertson* v. *Downing*, 127 U. S., p. 607.)

Where the meaning of a statute appears to be perfectly clear, no practice inconsistent with that meaning can have any effect. (*United States* v. *Alger*, 152 U. S., p. 384.)

In the case of Alger this court cites with approval *Swift & Co.* v. *United States* (105 U. S., p. 691), the *Graham Case*, and *United States* v. *Tanner* (147 U. S., p. 661). The case of the Swift company was an appeal from the Court of Claims. The law required the allowance of certain discounts on revenue stamps where parties furnished their own dies. The Treasury Department, by a general rule and the practice thereunder, made this discount payable in stamps at their face value instead of in money. This rule was followed from 1862 to 1879,

when the action was brought. Here was a uniform action for seventeen years under the construction in question, the general acquiescence of the purchasers, the payment by them of over forty million dollars under that construction, and subsequent revision and reenactment by Congress of the same statute with no change in this provision. This is a stronger case than the present one, and this court reversed the Court of Claims, and judgment was entered for the claimant.

If this decision be followed, the claimant's contention must fail.

The Indian depredation act of March 3, 1891, is strictly jurisdictional. It affords a remedy for all existing claims, but neither defines them nor creates new liabilities against Indians.

The Court of Claims said in the *Welch case* (32 C. Cls. R., 106) that the subject of liability must be measured by the terms of the act of 1834 (4 Stat. L., p. 729, sec. 17). The court further said:

> When that statute said that if Indians of a tribe in amity with the United States "shall, within the Indian country, take or destroy the property of any person lawfully within such country," the injured party (that is, the party "lawfully within such country") shall have against the Indians redress subsequently prescribed, and the United States will "guarantee to the party so injured an eventual indemnification," it necessarily excluded from its benefits such persons as should not be "lawfully within such country." The defining of one class of persons excluded other classes of persons from its intendment. *Expressio unius, exclusio alterius.* The act said in effect to Indians, if you "pass from the

Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy," you shall be held liable for your depredation; and if, within the Indian country, you "take or destroy the property of any person lawfully within such country," you shall likewise be held liable. But the statute assured indemnity to white men only in these two classes of cases, viz, *where the Indians were intruders in the white man's country, and where the white man was lawfully within the Indian's country.* * * * What it did do was to create a liability on the part of the Indians and a responsibility on the part of the United States, and at the same time prescribe the limitations within which this liability and responsibility only should arise. * * *

It therefore seems to the court that this statute, which limited the liability which it created to persons who are lawfully within the Indian country, itself defined what was unlawful. * * * The Indians may not have been justified in taking the law into their own hands and driving the settlers off by force or intimidation, but that was a matter between them and the United States. The Cherokee Nation (the Kiowa and Comanche Indians in the case at bar) was not liable to the person who was unlawfully within its territory, and the Government is not responsible to him for the consequences of his unlawful acts.

This court held, in the case of the *Corralitos Co.* v. *United States and Apache Indians*, that:

> The purpose of Congress in enacting the statute of 1891 undoubtedly was to provide thenceforth a judicial tribunal for the hearing of such claims and for their payment in accordance with the judgment of the court. It is true that the language of the

> provision in the act of 1891, which confers jurisdiction upon the Court of Claims, differs somewhat from that used in the various prior statutes, which had guaranteed the eventual indemnification of the claimant by the Government, but such difference is not, in our judgment, at all significant of an intention to enlarge the liability of the Government to a greater extent than had ever before been recognized. (Decided May 28, 1900, 178 U. S.

This court also held in the *Leighton Case* (161 U. S., 291):

> It follows, therefore, that, though under the terms of the second jurisdictional clause the Court of Claims had jurisdiction over this claim, yet the case having been reopened by the claimant, the Court of Claims properly proceeded to inquire into its merits, and correctly found that there was no law or treaty upon which to base a liability of the United States or the Indians.

The rule of law laid down in these cases applies here with peculiar force.

III.

THE ALLEGED PERMIT FROM THE CHEYENNE CHIEF, BEAR SHIELDS.

The claimant affirms that he procured from this Indian chief authority to pass through the reservation.

We have already had occasion to refer to the treaty provision (Art. XII) which forbids any surrender or transfer of any grant or easement without the concurrence of three-fourths of the tribe, and so the individual consent of this one chief availed nothing whatever. The fact that the claimant supposed he had a right to pass

through the reservation, when, in fact, he had no such right, can not help him. Such belief on his part can not change the statute. Assuming that an Indian chief had authority to grant any right of passage, this chief had no such right, as he was not a member of the Kiowa and Comanche Nation.

This court said in *Jones* v. *Meehan* (175 U. S., p. 1):

> A treaty between the United States and an Indian tribe must be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

The treaty provided that they were to have the absolute and undisturbed use and occupation of their reservation.

The United States solemnly agreed that no person should ever be permitted to pass over, settle upon, or reside in the reservation described in the treaty.

These terms and provisions could not have been misunderstood by the Indians, and they recognized that any trespass upon the reservation was a violation of their treaty rights, and for the violation of which no action could lie against them.

It is therefore respectfully submitted that the Court of Claims erred in awarding judgment in favor of the claimant and that the same should be reversed.

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